No. 13-19-00379-CV

Court of Appeals for the Thirteenth District of Texas

VALSTAY, LLC,

Plaintiff – Appellant,

v.

TEXAS WINDSTORM INSURANCE ASSOCIATION,

Defendant – Appellee.

On Appeal from the Nueces County 28th District Court
District of Texas, Hon. Nanette Hasette
Civil Action No. 2017-DCV-4203-A

AMENDED APPELLANT'S BRIEF

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Oral Argument Requested

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TRIAL COURT JUDGE:	The Honorable Nanette Hasette District Judge of the 28th District Court 901 Leopard St., Room 803 Corpus Christi, TX 78401

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RECORD REFERENCES

The Clerk's Record, which will be abbreviated CR, contains one volume. The Reporter's Record, which will be abbreviated RR, contains seven volumes of the trial proceedings. The Supplemental Reporter's Record, which will be abbreviated SRR, contains seven volumes of exhibits. Each record reference will provide the volume (if any) and page where the material may be found. For example, Valstay's Original Petition can be found at CR7-12. Similarly, the formal jury charge conference starts at 5RR4.

STATEMENT OF THE CASE

Nature of the Case: Valstay, LLC, the owner and operator of a hotel, sued the Texas Windstorm Insurance Association (TWIA), its windstorm property insurance carrier, over an unpaid claim for damages to the hotel from wind and hail. CR7-12.

Course of the Proceedings: On July 8, 2015, Valstay made a claim to TWIA for wind and hail damage to its hotel. 2RR36-37, 2RR208-209, SRR 165. For wind, TWIA denied coverage for the entire claim because it claimed the damage preexisted the loss date and was from a lack of, or improper, maintenance. 2RR209, 2SRR 392-393. For hail, TWIA denied because it was not large enough to have caused damage. 2SRR393. Valstay sued, claiming the damage was covered by Valstay's consecutive insurance policies with TWIA from August 2012 to October 2015. CR8-9, 82-83.

The parties tried the case to a jury. 2RR4-4RR 186. The evidence at trial discussed whether various storms could have caused the hotel's damage. 2RR 127-129; 4RR45-48. The trial court—over Valstay's objections—instructed the jury about whether the damage to the hotel occurred from only two specific storms (hail on April 13, 2015 and wind on May 24, 2015) and placed the burden of proof entirely on Valstay. CR731-742; 5RR7-14.

Shortly after deliberations began, the jury asked if it could only consider the two storms listed in the jury charges, asking the trial court about the other evidence besides those dates. CR817; 5RR82. The trial court instructed the jury to "follow the Court's instructions and the evidence admitted." 5RR82. The jury returned a verdict in favor of TWIA. CR731-743, 5RR83. TWIA moved for judgment, and Valstay moved for a new trial. CR744-748; CR755-817.

Trial Court's Disposition: The trial court entered the Final Judgment requested by TWIA. CR751-753. The trial court denied the request for a new trial. CR827. This appeal followed. CR829.

STATEMENT REGARDING ORAL ARGUMENT

Valstay requests oral argument because it would significantly aid this Court's determination of the issues. First, it would allow the parties to further explain the evidence, the insurance policies, and the specific statutes governing TWIA claims. Second, some of the legal issues—about the TWIA statutes and how to instruct the jury in a TWIA case—have never been addressed by any Court. Oral argument would allow the parties to emphasize and clarify the written arguments, and assist the Court in mastering the record, including the various nuances in the evidence and events, which will help the Court not only decide this case but also make an informed decision that will guide future cases.

STATEMENT REGARDING JURISDICTION

This Court has appellate jurisdiction over appeals from final judgments occurring within its district for cases involving controversies exceeding $250—which is met in this case because the amount in controversy in the underlying case was over $1,000,000. TEX. GOV'T CODE § 22.220(a); CR7; 2RR78. This Court's appellate district includes Nueces County, Texas and the 28th Judicial District. TEX. GOV'T CODE § 22.201(n)

and § 24.130. Because this case involves an appeal from a final judgment where the amount in controversy was over $250 from the 28th Judicial District Court, this Court has jurisdiction to decide this appeal.

ISSUES PRESENTED

1. A trial court must charge the jury with legally correct definitions, instructions, and questions to answer the issues presented in the case. The charge, here, violated this principal by failing to guide the jury with the proper legal standards from the statute and policy as well as which party bore the burden of proof. The charge also commented on the evidence. Should this Court reverse and remand for a new trial?

2. The trial court conditioned Questions 3 and 4 about statutory bad faith on a finding of liability for the statutory coverage question. But the bad faith statute does not condition liability on a finding of coverage, and the jury heard evidence of bad faith regardless of the answer to the coverage question. Should this Court reverse and remand for a new trial?

No. 13-19-00379

Court of Appeals for the Thirteenth District of Texas

VALSTAY, LLC

Plaintiff - Appellant

v.

TEXAS WINDSTORM INSURANCE ASSOCIATION,

Defendant – Appellee

TO THE HONORABLE COURT OF APPEALS:

Valstay, LLC. files this amended brief, asking this Court to reverse the trial court's judgment and remand this case for a new trial.

INTRODUCTION

Individuals and businesses purchase insurance to protect themselves and their property against certain risks. Conversely, insurers accept premium payments to take on the risk if it were to occur. Here, Valstay bought insurance from Texas Windstorm Insurance Association (TWIA)—starting in 2005 and with this exact policy's terms and conditions since 2012—to protect its hotel from windstorm and hail. 2RR49; 4RR153; CR127-128. No one disputes that the hotel suffered one of the covered

perils, and the dispute here turns on when that damage occurred—whether it was within a period insured by TWIA and timely reported by Valstay—and who had the burden to prove those issues.

At trial, the parties presented evidence of when the hotel was damaged by wind and hail. Valstay theorized two specific storms caused the damage; TWIA theorized that those storms did not cause the damage. 2RR 127-129; 2RR120-123; 3RR175; 3RR193-194. But the parties agreed that an engineer for the Texas Department of Insurance—as a condition of issuing TWIA's policies—inspected the hotel and certified that, as of March 2013, it was not damaged. 1SRR65-67; 2RR53-56; 2RR207. The agreement meant that the damage occurred after that inspection and during the time that TWIA insured the property. TWIA argued that the policy required Valstay to report the loss within a certain period and had not. 2RR34, 41-42; CR16-17. The parties agreed the hotel sustained damage from a covered peril, but they disputed whether Valstay timely reported the damage. In the end, the parties and evidence discussed a variety of storms that may have caused the hotel's damage and that may have been within the policy's reporting period. 2RR 127-129; 4RR45-48; 1SRR68-127; 2SRR399-431. But the evidence was not conclusive for any party.

With this backdrop of the evidence, Valstay asked the trial court to charge the jury with answering whether the covered damage occurred "during the policy periods of August 31, 2012 to October 1, 2015." CR707. The trial court rejected that request and instructed the jury to only answer whether two specific storms caused the hotel's damage. CR734. The Court's instruction ignored the evidence of other storms affecting the hotel. And Question 1 failed to address the issue of whether Valstay met the policy's reporting requirements, if other storms that potentially caused the damage.

At the start of deliberations, the jury, apparently realizing that it had heard about other storms, asked whether they were limited to just the two storms in the jury charge. CR817; 5RR82. The trial court continued course and instructed the jury to answer the questions asked. 5RR82. The jury did just that and found that the two specific storms did not damage the hotel. CR734. But their answer did not address the other storms. Nor did it answer whether Valstay reported the damage within the time required by the policy.

The jury charge had another problem—it failed to address all of Valstay's claims. In addition to suing for damages for not paying for the insured risk, Valstay also sued TWIA for statutory bad faith, including its failure to conduct a reasonable investigation. CR10, CR84. The trial court,

however, conditioned the bad faith questions on a "yes" answer to whether TWIA breached the policy. CR736-737. This is at odds with the Supreme Court's recent clarification that a bad faith claim does not depend solely on whether the insurer breached the policy. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 490-501 (Tex. 2018). Thus, the conditioning instruction resulted in the jury not answering questions about Valstay's other claims.

A trial court's jury instructions should, based on the evidence presented, provide the jury with the legal guidance to answer the questions posed about the claims presented. Here, the instructions failed to capture the evidence presented and account for the possibility that the jury might reject both sides' theories of what storm caused the hotel's damage. And the instructions failed to answer if Valstay reported the claims timely and failed to account for Valstay's bad faith claims. These errors warrant a new trial.

STATEMENT OF FACTS

A. Valstay Purchased Windstorm Insurance with TWIA for More Than a Decade; in 2013, TWIA Demanded that Valstay Repair the Roof as a Condition of Insurance, and Valstay Complied.

Valstay purchased windstorm insurance from TWIA to protect its hotel, The Valstay Inn & Suites, from the risk of damage from hail and wind for many years. 2RR49; 4RR153; CR127-128. The parties stipulated that

TWIA continuously insured the hotel—under the same policy language—against the perils of wind and hail from 2012 through Valstay's report of damage. CR127-128. Indeed, the jury heard testimony that TWIA continuously insured Valstay's hotel for these perils from 2005 until 2015. 4RR153.

In late 2012, TWIA threatened to cancel Valstay's then existing policy unless Valstay could show that the hotel's roof was in proper working condition. 1SRR10-11. Valstay then repaired the roof. 2RR 206-207. In March 2013, Ronald Voss, an engineer, approved by the Texas Department of Insurance certified that the roof had been repaired and was in proper operating condition. 1SRR65-67. As of March 2013, Valstay and TWIA, through Voss's certification, agreed that the roof was undamaged and in proper working condition. 1SRR65-67; 2RR53-56; 2RR207.

B. After a TWIA-Required Inspection and During the Time When TWIA Covered Valstay's Hotel, Wind and Potentially Hail Damaged the Hotel.

Within two years after the repairs, the roof sustained significant damage. Every witness who inspected the roof testified that wind damaged the hotel. 2RR61-64; 2RR78; 2RR83; 2RR127; 3RR70; 3RR72-73; 4RR84; 4RR125-126; 4RR144. And some of the witnesses testified that hail damaged the hotel. 2RR102; 2RR114-115; 3RR63-65.

Valstay's Roofing Consultant, Gary Treider, and Valstay's Roofing Contractor, Edwin Green, testified that both wind and hail damaged the hotel during the period from Voss's certification to when Valstay reported a claim on July 8, 2015. 2RR102; 2RR114-115; 2RR127; 3RR63-65; 3RR70; 3RR72-73. TWIA's Building Consultant, Mark Henry; TWIA's Independent Adjuster, Howard Wible; and TWIA's Corporate Representative, Paul Strickland, all testified that the roof sustained wind damage between August 31, 2012 and October 1, 2015. 2RR61-64; 2RR78; 2RR83; 4RR84; 4RR125-126; 4RR144. Treider's report purported to document wind and hail damage. 2SRR399-431. In contrast, Wible's reports purported to document only wind damage. 2SRR206, 210-211, 219, 238-240.

Indeed, TWIA's independent adjuster Wible took photographs that he described as documenting wind damage, the "roofing [was] blown off" and "blown loose,"

3-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

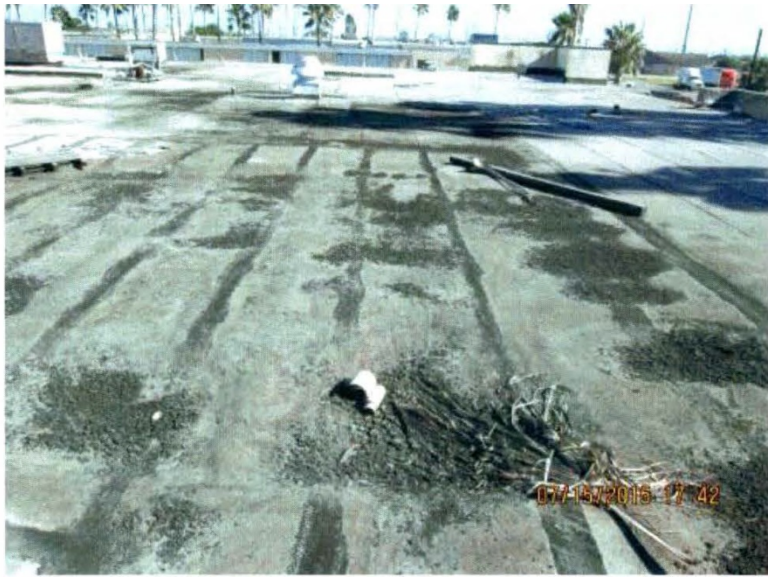
Patched roofing visible with second layer of patched roofing blown off.

4-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

Wind damaged patched area with roofing blown off

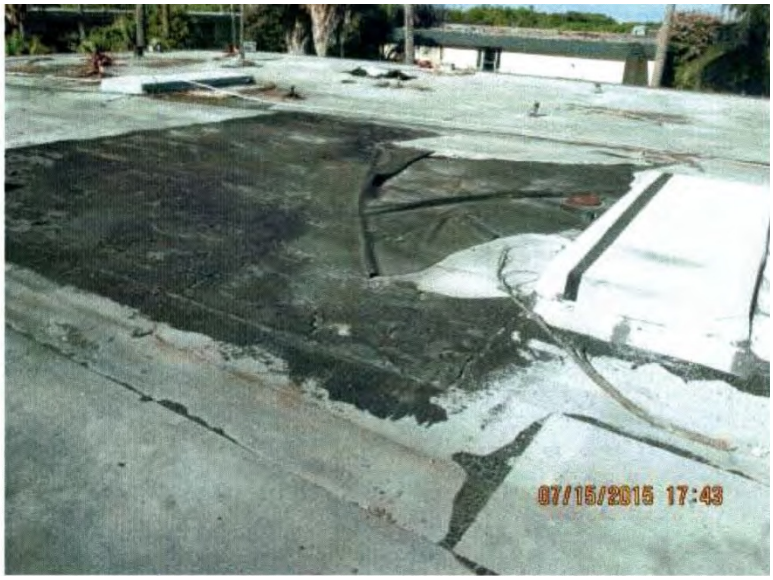
7-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

Common area patched roofing has blown off



11-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

Patched roofing blown loose



12-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

Roofing patch blown loose

4SRR383, 385, 387. Wible's photographs also documented some of the roofing "ha[d] blown off and was piled against the abandoned AC unit,"

5-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

Patched roofing has blown off and is piled up agains the abandoned AC unit. Areas of failed decking are visible where water is ponding. At the time of this photograph, there had been no rain at the risk in over 14 days.

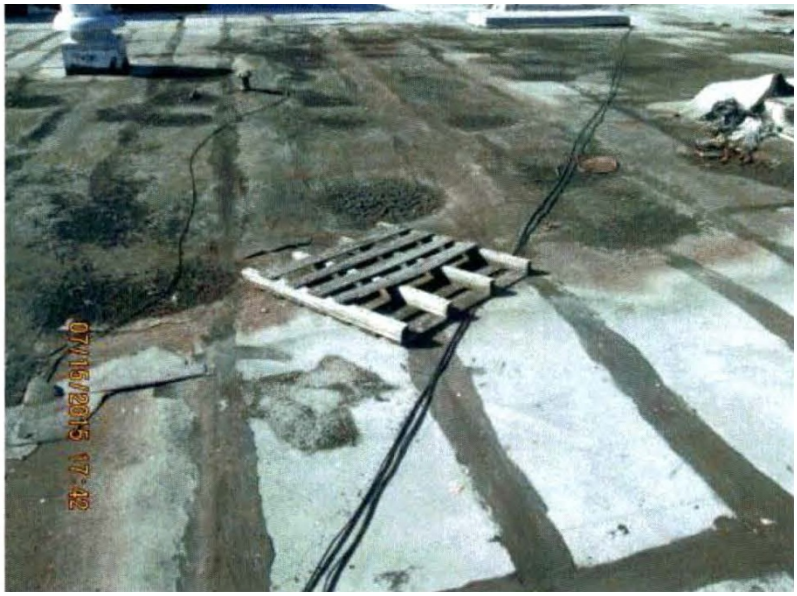
4SRR384. According to his pictures, "common area roofing...has blown off" and that the "[r]oofing and roof deck has failed...."

6-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

View of common area roofing where patch has blown off. Roofing and roof decking has failed, as noted in the dips in the roofing pictured here.

8-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

Failed roofing and decking under the patched area that has been blown off.



4SRR384-385. Even the photographs, according to Wible, evidenced wind damage to the roof,

9-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

Wind damage to patched roofing

10-Roofing - Common Area
Date Taken: 7/15/2015
Taken By: Howard Wible

Wind damage to patched roofing

4SRR386.

Other photographs and documents revealed wind or hail damage to the roof. 1SRR258-588, 2SRR2-323, 6SRR2-293, 7SRR434-443 1SRR245-255, 2RR444-561, and 3SRR133-174. Every person who inspected the roof or testified identified at least one covered peril as causing damage to the hotel during the time that TWIA insured the property. *Id*. As for the cost of

repair, two witnesses (Edwin Green for Valstay and Cecil Parker for TWIA) explained the cost to repair the wind damage was between $343,000 and $1.8 million. 3RR159, 2RR77-78.

C. Valstay Reported the Claim to TWIA, Which Denied Coverage, Resulting in This Lawsuit.

Valstay reported its loss to TWIA on July 8, 2015. 2RR36-37, 2RR208-209, SRR 165. In response, TWIA hired Wible to investigate the loss and adjust the claim. 4RR102; 4RR109. TWIA and Wible then retained Halliwell Engineering Associates, Inc. to investigate the damages to the property. 3RR153.

Around July 15, 2015, Wible and Mark Henry from Halliwell inspected the hotel. 3RR153-154. In its report, Halliwell initially concluded that the Valstay's property sustained no damage from a covered peril and that any damage was merely "wear and tear," which the policy excluded. 1SRR240. Halliwell eventually changed its tune and admitted that the hotel sustained wind damage. 3RR169.

After the deadline to admit or deny coverage under the governing TWIA statutes, TWIA denied coverage for Valstay's entire claim. 2RR209, 2SRR392-398. The denial letter claimed the "damage pre-existed the date of loss and was the type of deterioration that [was] due to lack of, or improper, maintenance of the roofing systems." 2SRR392-393. Later,

TWIA took the position that the damage occurred before December 2014. 2RR64-67; 5RR58-59; 2SRR392.

That position ignored that TWIA continuously insured Valstay's hotel against wind damage since at least 2005, long before the TDI-approved engineer certified the roof to be in good working order. 2RR49; 4RR153; CR127-128. And that position ignored that TWIA's policy—according to TWIA's own pleading—contained a reporting requirement that gave Valstay up to a year to report claims after a triggering event. 2RR34, 41-42; 1SRR156; CR16-17. Even taking TWIA's affirmative defense at face value, Valstay's claim report on July 8, 2015 would cover claims dating back to July 8, 2014, or an entire year before the July 2015 claim.

Meanwhile, after Valstay reported the claim, Cecil Parker—the contractor hired by TWIA to estimate the cost of repairs—inspected the property and concluded that wind damaged the roof to the tune of $343,000 in needed repairs. 2RR77-78. And while Halliwell asserted the roof damage occurred prior to December 2014, Wible—the TWIA-hired adjuster—recommended raising the insurance reserves for the damage to the hotel to $450,000. 4RR145; 2RR63. TWIA then increased its reserves. 2RR63.

In the end, TWIA accepted Halliwell's conclusion that the damage to

the hotel occurred prior to December 2014 based on pictometry (aerial photographs). 2RR64-66. Despite the window for a timely reported claim reaching back to July 2014, Halliwell only determined that the two specific storms from 2015 (claimed by Valstay to have been the cause of the damage to the roof) were not the cause. 3RR175; 3RR193-194. Halliwell did not determine what storm caused the damage; nor did it determine whether the damage occurred within or outside the one year reporting window. 2RR67; 3RR175.

Despite claiming that the damage occurred before December 2014, TWIA never informed Valstay that its hotel sustained wind damage that may have occurred during a prior TWIA policy. 2RR 67-68. TWIA denied coverage for the claim because it did not happen on the days claimed. 2RR209, 2SRR 392-398. And TWIA failed to tell Valstay during the investigation of the claim that "wind damage...may have occurred during [TWIA's] policy period or periods." 1SRR240. TWIA only told Valstay that a lack of maintenance caused damage to the roofing system. 2SRR392-393.

Valstay sued TWIA, alleging that the hotel sustained covered wind and hail damage when TWIA insured the property. CR7-12; CR80-86. Valstay did not allege that any specific storm caused the damage, but instead alleged that it occurred between the March 2013 certification that

the roof was in proper working condition and the date of the Halliwell inspection that found wind damage. CR8-9; CR82-83.

Valstay also alleged TWIA improperly denied Plaintiff's wind and hailstorm insurance claim and violated Chapter 2210 of the Texas Insurance Code by denying Valstay's claim without a reasonable investigation as well as denying coverage after liability had become reasonably clear. CR10-11; CR84-85. It alleged damages in the amount of the cost to repair the hotel, consequential damages, attorney's fees, and additional damages for the violation of Chapter 2210. CR11; CR85. TWIA generally denied the allegations and also alleged, as an affirmative defense, that Valstay failed to report the damage within a year of its occurrence, which barred—in whole or in part—Valstay's damages based on the policy's reporting requirement. CR13-20.

D. The Court's Charge

Claims against TWIA are governed by statute, which was amended in 2011 and not many cases have been tried under the new statute. Section 2210.576 of the Texas Insurance Code limits claims against TWIA's non-payment of claims to "whether the association's denial of coverage was proper" and to the "amount of damages." TEX. INS. CODE § 2210.576(a). TWIA, by statute and by the terms of the policy, requires that the insured

report a damage claim within one year of the event. TEX. INS. CODE ANN. §§ 2210.205 and 2210.573; 1SRR156.

Over Valstay's objection (5RR7-14), the trial court charged the jury to answer a breach of contract question whether TWIA "fail[ed] to comply" with the policy related to two specific storms:

> **QUESTION NO.1**
>
> Did *Texas Windstorm Insurance Association* fail to comply with the agreement entitled T.W.I.A. Commercial Policy?
>
> The Texas Windstorm Insurance Association Dwelling Windstorm and Hail Policy cover direct physical loss to the covered property cause by windstorm or hail during the policy period.
>
> *Texas Windstorm Insurance Association* failed to comply with the agreement if it failed to pay for all windstorm damage, if any, that resulted from the alleged event occurring on May 24, 2015, that it either (1) knew about, or (2) should have known about after a reasonable investigation.
>
> *Texas Windstorm Insurance Association* failed to comply with the agreement if it failed to pay for all hail damage, if any, that resulted from the alleged event occurring on April 13, 2015, that it either (1) knew about, or (2) should have known about after a reasonable investigation.
>
> Answer "Yes" or "No" for each of the following:
>
> A. Windstorm
>
> Answer: _____
>
> B. Hail

Answer: _____

CR734; 5RR7-14.

That question did not ask the statutory question of whether denial of coverage was proper. *Compare* Tex. Ins. Code § 2210.576(a) *with* CR734. And that question limited when the damage could have occurred to the two specific dates—despite the evidence heard by the jury that offered other potential damage dates and TWIA's policies covering a range of time and had a one-year-reporting period, which were also Valstay's objections. 5RR7-9. The charge also instructed the jury that Valstay had to prove that TWIA knew or should have known of the damage on those two dates. CR734. Valstay objected to that inclusion because the statute contains no "knowledge" requirement. 5RR10-11.

This issue also became a burden of proof problem. Whether the jury agreed, Valstay presented legally sufficient evidence that the wind damage occurred on May 24, 2015 and hail damage on April 13, 2015. *See* 3RR132-133 (denying TWIA's directed verdict motion on both issues). But the jury also heard evidence of TWIA's version of events—that the damage occurred before December 24, 2014. 4RR6-8. And the evidence contained information about other storms that affected the hotel as well as the one-year-reporting obligation for claims to TWIA. 1SRR68-127; 2SRR416-430;

2RR34, 41-42; CR16-17. While Valstay proposed damage dates of May 24, 2015 and April 13, 2015, the July 8, 2015 claim report was enough to include all damage from July 8, 2014 through July 8, 2015—or the one-year-reporting period. TEX. INS. CODE §§ 2210.205 and 2210.573; 1SRR156. While limitations for reporting claims are treated as affirmative defenses, the jury charge never placed that burden on TWIA to prove that the damage occurred outside the reporting period; Valstay objected to the charge not treating an affirmative defense as part of TWIA's burden. CR734; 5RR7-14.

Shortly after the jury received the case following closing arguments, the jury—apparently recognizing that it heard evidence of other potential storms—asked whether its decision was just limited to the two dates provided in the jury charge,

> Are the following two dates the only two dates we're [allowed] to consider:
>
> (1) May 24, 2015 for wind
> (2) April 13, 2015 for hail
>
> If so, do we omit all other prior dates?

CR817; 5RR82. The jury recognized Valstay's problem with the charge—that the evidence presented potential dates of damage different than the two listed in the charge. The jury wanted to know what to do if they did not believe that the damage necessarily occurred on those two dates but that a

covered peril had occurred. The trial court responded by telling the jury to "follow the Court's instruction and evidence admitted." 5RR82.

The Charge also conditioned the remaining questions directly or indirectly[1] on the answer to Question 1. CR735-739. This conditioning included Question 3—regarding Valstay's bad faith claims for violations of Chapter 2210 of the Texas Insurance Code. CR736. That conditioning only envisioned a world where the bad faith questions could be favorably answered based on a finding that TWIA improperly denied coverage. But the bad faith evidence went beyond the mere denial of coverage and attacked the propriety of TWIA's investigation, which initially denied coverage was "wear and tear" while later admitting that wind had damaged at least part of the roof. 2RR209, 2SRR 392-398; 2RR66-67. Valstay objected to the conditioning of the bad faith questions because such claims do not necessarily require the denial of coverage. 5RR11-13.

A non-unanimous jury (11-1) eventually answered "no" to the two specific dates in the jury charge. CR734, 743; 5RR83. The trial court never

[1] The trial court directly conditioned Questions 2, 3, and 6 to a "yes" answer to Question 1. CR735, 736, 740. Question 4 was indirectly conditioned on Question 1 because it required a "yes" answer to any part of Question 3, which was directly conditioned on a "yes" answer to Question 1. _CR736, 737. Similarly, Question 5 was indirectly conditioned on a "yes" answer to Question 1 because it required a "yes" answer to Question 4, which required a "yes" answer to Question 3, which required a "yes" answer to Question 1. CR736, 737, 739.

asked the jury whether it believed that the hotel sustained covered perils during the one-year reporting period and whether TWIA properly denied those claims. Nor did the trial court ask whether TWIA proved its affirmative defense that the damage occurred outside of the one-year reporting period. Because of the conditioning question, the jury never answered whether TWIA acted in bad faith separate and apart from the denial of coverage. Finally, the jury never answered a question about whether TWIA had proven its affirmative defense based on the timeliness of Valstay's claim reporting.

SUMMARY OF THE ARGUMENT

Question 1 contained many harmful errors. *See* SECTIONS B.1-B.3, *infra*. From a liability perspective, a cause of action against TWIA is limited to whether the denial of coverage, not the claim, was proper. Instead of asking that specific statutory question, Question 1 asked whether TWIA complied with its agreement. That misstated the law and was error. *See* SECTION B.1, *infra*.

The trial court further misstated the law by limiting Question 1 to just two specific dates, one for wind damage and one for hail damage. *See* SECTION B.1, *infra*. But TWIA provided coverage for Valstay's hotel beyond those two dates. And the evidence included other storms that could have

damaged the hotel. By formulating the question in this fashion, the trial court limited TWIA's potential liability beyond the statutory language and in the process ignored evidence. This problem also misstated the insurance policy because the policy is not an "occurrence" policy and covers all perils during a period of time, not just a specific occurrence on a date or two. *See* SECTION B.1.d, *infra*.

On top of this error, Question 1 required that the jury only find liability if TWIA knew or should have known about covered perils on those two dates. *See* SECTION B.1.b, *infra*. But the statutory claim only asks whether the denial of coverage was "proper" and not whether TWIA knew or should have known about the covered peril. Adding this knowledge component to Question 1 elevated Valstay's burden of proof beyond what the statute requires.

Question 1 misplaced the burden of proof. *See* SECTION B.2, *infra*. TWIA insured Valstay's hotel against wind and hail long before the events in question. A TWIA-approved engineer certified the roof in good working condition in March 2013. By July 2015, everyone agreed the roof, at a minimum, sustained wind damage, which occurred when TWIA insured the property. TWIA's affirmative defense to these claims was that Valstay did not report the claim within the one-year-reporting window. TWIA claimed

that the damage occurred before December 2014, but TWIA could not say when before that time. Valstay reported the claim on July 8, 2015, which then included any damage to the hotel from wind or hail from July 8, 2014 to July 8, 2015—or the one-year-reporting window. But that statute-of-limitations-like defense is an affirmative defense. *See* SECTION B.2.a, *infra*. That meant TWIA bore the burden to show that the covered peril occurred outside that one-year period. Merely proving the damage occurred prior to December 2014 did not prove that the damage occurred outside the one-year period. Instead of placing the burden on TWIA's affirmative defense, Question 1 placed it on Valstay. Even if the knew-or-should-have-known issue was proper, it would be an affirmative defense. The charge incorrectly placed the burden of proof for this affirmative defense on Valstay. *See* SECTION B.2.b, *infra*.

Question 1 improperly commented on the evidence. *See* SECTION B.3, *infra*. The evidence included evidence beyond just the two storms mentioned in the charge. That resulted in the trial court instructing the jury to, in essence, ignore that other evidence. And that comment fails to account for the situation where the jury might believe parts of each side's case and disbelieve other parts.

These problems with Question 1 went to the heart of the disputed issue in the case—when the damage occurred, did it occur during a TWIA policy period, and whether Valstay timely reported that damage. Question 1 failed to allow the jury to answer those issues, and even the jury recognized the problems with that question because it asked, "what about the other evidence." Those errors are harmful errors because they resulted in the jury not being correctly guided by the law or even asked the correct question. And Question 1 incorrectly placed the burden of proof, at least in part, on Valstay. That requires reversal and remand for a new trial.

The trial court also reversibly errored with Questions 3 and 4. *See* SECTION C, *infra*. Both questions where conditioned on an affirmative finding of liability in response to Question 1. But bad faith can exist outside of a liability finding. Valstay presented evidence of how TWIA committed bad faith that harmed Valstay. At a minimum, TWIA did not meet the deadlines and timelines established in the statute. The conditioning question harmed Valstay because the jury did not answer the bad faith question. The improper conditioning requires reversal and a new trial.

All these charge issues were the hotly contested issues central to the case and mingled valid and invalid legal theories. That is harmful error.

Because the jury charge was erroneous, this Court should reverse and remand for a new trial. *See* SECTION D, *infra*.

ARGUMENT AND AUTHORITIES

A. Standard of Review

The standard of review for jury-charge error is not simple. The standard, frequently, is described as abuse of discretion. *Tex. Dep't of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990)(op. on reh'g). Even under that standard, a trial court has no discretion in determining or applying the law. *In re HEB Grocery Co., L.P.*, 492 S.W.3d 300, 302-303 (Tex. 2016)(orig. proceeding)(per curiam). So a trial court—even with discretion—cannot misstate the law in the jury charge,

> Because a trial court has no discretion to misstate the law, courts review de novo whether an instruction in a jury charge misstates the law based on improper statutory construction.

In re Commitment of Flores, No. 13-19-00093-CV, 2020 WL 1613418, at *11 (Tex. App.—Corpus Christi 2020, n.p.h.)(citing *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 525 (Tex. 2002)).

Courts give no discretion to legal questions. So the Supreme Court of Texas gave no discretion to the trial court when evaluating whether a jury charge (1) accounted for a contractual limitation of a fiduciary duty, (2) submitted all elements of the cause of action, and (3) properly defined an

element of the cause of action. *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 847 (Tex. 2004); *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.3d 235, 238-240 (Tex. 1992); *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989). *See also* W. Wendell Hall, et al., *Standard of Review in Texas*, 50 St. Mary's L. J. 1099, 1280-1283 (2019)(saying the de novo standard applies to the legal issues within the charge).

A trial court must submit issues that one party pleaded and has more than a scintilla of evidence because "Rule 278 provides a substantive, non-discretionary directive to trial courts *requiring* them to submit requested questions to the jury if the pleadings and *any* evidence support them." *Elabor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992)(emphasis added). *See also id*., at 245 ("The plain language of Rule 278 bound the trial court to submit [the defendant's question," which was properly pleaded and supported by evidence.) And "[w]hether a charge submits the controlling issues in a case, in terms of theories of recovery or defense, is a question of law that [courts] review de novo." *Total E & P USA, Inc. v. Mo-Vac Serv. Co.*, No. 13-10-00021-CV, 2012 WL 3612505, at *9 (Tex. App.—Corpus Christi 2012, pet. denied). A question is defective, "if it plainly attempts to request a finding on a recognized cause of action, but [it] does so

improperly." *Se. Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999).

The trial court also has no discretion in providing legally correct definitions and instructions. "An instruction that misstates the law as applicable to the facts or one that misleads the jury is improper." *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973); *Steak & Ale of Tex., Inc. v. Borneman*, 62 S.W.3d 898, 904-905 (Tex.App.—Ft. Worth 2001, no pet.)(on remand). Similarly, courts apply a de novo standard when evaluating whether a definition is legally correct. *St. Joseph Hosp.*, 94 S.W.3d at 525.

Even under an abuse-of-discretion standard, the reviewing court still asks whether "the request was reasonably necessary to enable to the jury to render a proper verdict." *Shupe v. Lingafelter* 192 S.W.3d 577, 579 (Tex. 2006)(per curiam). "Proper" requires an accurate statement of the law. *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 568, 470 (Tex. App.—San Antonio 1998, pet. denied).

A trial court cannot comment on the evidence. That issue "is a question of law reviewable de novo." *Flying J Inc. v. Meda, Inc.*, 373 S.W.3d 680, 687 (Tex. App.—San Antonio 2012, no pet.). *See also Schack v. Prop. Owners Ass'n of Sunset Bay*, 555 S.W.3d 339, 355 (Tex. App.

Corpus Christi 2018, pet. denied). ("A comment on the weight of the evidence may take many forms, but we specifically prohibit judicial comments that indicate the opinion of the trial judge as to the verity or accuracy of the facts in inquiry. A submission to the jury is objectionable if it assumes a disputed fact in issue."). An improper nudge or tilt by a court's comment is reversible error. *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 724 (Tex. 2003).

In reviewing alleged charge error, courts consider "the pleadings of the parties and the nature of the case, the evidence presented at trial, and the charge in its entirety." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009). If the charge otherwise addresses the issue, error could be harmless. *See Shupe*, 192 S.W.3d at 580 (concluding that any error by failing to submit negligent entrustment question was harmless when the jury found the driver entrusted with the truck was not negligent, which defeated an essential element of a negligent entrustment claim). But error is harmful when it does not account for the party's theory and evidence. *Elabor*, 845 S.W.2d at 245 (concluding that submission of failure to mitigate did not account for defendant's theory of contributory negligence).

In deciding whether jury charge error is harmful, courts consider an improper charge on "a contested, critical issue" is harmful when every question in the charge turns on that question. *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012). Charge error that "relates to a contested, critical issue" by itself is considered harmful. *Columbia Rio Grande*, 284 S.W.3d at 856.

Charge error is presumed harmful when it combines valid theories with invalid one and mixes up which party has the burden of proof. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000); *Brannan Paving GP, LLC v. Pavement Markings, Inc.*, 446 S.W.3d 12, 24 (Tex. App.—Corpus Christi 2013, pet. denied)("We hold that the trial court's inclusion of a valid theory of liability and an improperly included affirmative defense instruction in the same question with only one answer blank created the type of confusion that *Casteel* presumed-harm analysis was designed to address.")

B. Question 1 was reversible error (Issue 1).

The main liability question had three significant flaws, resulting in the trial court improperly asking the jury the wrong question. CR734. First, that question and attendant instructions misstated the law and the insurance policy and did not account for the evidence presented at trial. *See*

SECTIONS B.1 and B.2, *infra*. Second, that question also improperly presented TWIA's affirmative defenses as though Valstay bore the burden of proof on them. *See* SECTION B.3, *infra*. Third, that question improperly commented on the evidence. *See* SECTION B.4, *infra*. For any or all of these reasons, submitting question one was harmful error, requiring reversal.

1. Question 1's "fail to comply with the agreement" language misstated the law and improperly limited the jury's consideration of the evidence presented.

The Legislature created the Texas Windstorm Insurance Association back in the 1970s, which allowed individuals and businesses in the Gulf Coast to obtain wind and hail coverage when the private market would not provide coverage. Updated most recently in 2011 and now codified in Chapter 2210 of the Texas Insurance Code, the Legislature limited an insured's ability to seek damages for a claim against TWIA.[2] *See* TEX. INS. CODE ANN. § 2210.572(a). The 2011 legislative overhaul made significant changes to the law governing TWIA, including restrictions on policy terms, remedies, and procedural requirements.[3] Question 1, as submitted to the jury, did not comport with the law or the terms of the policy.

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[2] The Act defines a "claim" as a policyholder's request for payment under an association policy and any other claim against the association relating to an insured loss. TEX. INS. CODE ANN. § 2210.571(2) (West Supp. 2016).

[3] *See* Texas Windstorm Insurance Association Act, 82nd Leg., 1st C.S., ch. 2, § 41, 2011

a) The statutory claim asks whether TWIA's denial of coverage was proper, not whether TWIA complied with the agreement and not whether damage occurred on specific dates.

Section 2210.575 of the Insurance Code effectively codified the hoops that an insured must jump through to sue TWIA for a wrongful denial of coverage. TEX. INS. CODE ANN. § 2210.575. If the various hoops still do not resolve the coverage issue, the insured can sue to determine "whether the association's denial of coverage was proper" and "the amount of damages." TEX. INS. CODE ANN. §2210.576(a).

That leads to the first problem with Question 1: it did not track the statutory language, which was one of Valstay's objections to that question. 5RR11. Instead of asking "whether TWIA's denial of coverage was proper," it asked whether TWIA "fail[ed] to comply with the agreement." *Compare* TEX. INS. CODE ANN. 2210.576(a)(1) *with* CR 734. Indeed, the statute is clear that a claimant like Valstay cannot ask whether TWIA complied with the policy and can only ask whether TWIA's denial was proper,

> The only issues a claimant may raise in an action brought against [TWIA]...are: (1) whether [TWIA's] denial of coverage was proper; and (2) the amount of the damages...to which the claimant is entitled, if any.

Tex. Gen. Laws 5180, 5192–98 (current version at Tex. Ins. Code § 2210.572(a)). The revisions, effective September 28, 2011, apply to TWIA policies delivered, issued for delivery, or renewed by TWIA on or after November 27, 2011. *See id*. § 62, 2011 Tex. Gen. Laws at 5205–06.

TEX. INS. CODE ANN. § 2210.576(a).

The Supreme Court has warned that jury charges in statutory causes of action "should track the language of the provision as closely as possible." *Borneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 413 (Tex. 2000). *See also, R.R. Com'n of Tex. v. Gulf Energy Expl. Corp.*, 482 S.W.3d 559, 571 (Tex. 2016)(concluding that party requested a proper jury question when it "generally tracked the pertinent statutory language"). Here, the question is not close to the statute.

Instead of asking whether the denial was proper, the trial court asked the general breach of contract question from the Texas Pattern Jury Charges about whether TWIA "failed to comply" with the insurance policy. CR734 The breach-of-contract language is overly broad (and incorrect) because the Insurance Code limits the Valstay's cause of action just to improper denial of a coverage and eliminates any other potential breaches of the policy by TWIA. TEX. INS. CODE ANN. § 2210.576(a). The trial court combatted the overly broad question with overly narrow instructions that went beyond the statutory restriction and ignored the evidence presented, amounting to reversible error and harming Valstay.

As part of the breach-of-contract question the trial court instructed the jury on what amounted to "a failure to comply" by limiting the failure to

a specific date for wind, a specific date for hail, and to what TWIA "knew about or should have known about after reasonable investigation" for wind and for hail. CR734 (numbering omitted). The statute offers no support for any of those restrictions. The statute limits the question to be asked to whether TWIA's "denial of coverage was proper" and damages. TEX. INS. CODE ANN. § 2210.576(a).

Beginning with the specific dates to which Valstay objected (5RR7-8), the trial court's language tracked the specific "claim" lodged by Valstay. But the Legislature opted for a different formulation of the cause of action, triggering liability to an improper "denial of coverage," not the claim. The Legislature specifically defined "claim" as "a request for payment under an association policy" against the association or related entities, "relating to a loss" under any theories or types of damages sought. TEX. INS. CODE ANN. § 2210.571(2). The Legislature did not use that term synonymously with "coverage."[4]

[4] *See* TEX. INS. CODE ANN. § 2210.574(a)("If the association accepts *coverage* for a *claim* and the claimant disputes only the amount...or if the association accepts *coverage* for a *claim* in part and the claim dispute the amount of loss...for the accepted portion of the *claim*, the claimant may request" certain information); § 2210.5741(a)("After the association accepts coverage for a claim in full or in part, a claimant whose association policy includes replacement cost coverage...may request the replacement cost payment...."); § 2210.575(a)("If the association denies coverage for a claim in part or in full and the claimant disputes that determination, the claimant...must provide the association with notice that the claimant intends [to sue]").

If the Legislature wanted to limit the cause of action to just the claim asserted by the claimant, it would have limited the action to whether the association's denial of the *claim* was proper, instead of the "denial of coverage." That language would have limited judicial review to the propriety of the insurer's denial of the specific claim asserted by the insured. By using "coverage," the Legislature indicated that it wanted the Association to have liability for *coverage* wrongly denied, not just claims wrongly denied. Thus, this statutory cause of action is not—and should not be—limited to the specific dates that the insured claims a covered peril occurred. The trial court's instruction limiting the proper-coverage-denial question to May 24, 2015 for wind and April 13, 2015 for hail overly limited the jury's consideration of the statutory cause of action that looked to the propriety of the denial of coverage. CR734.

The Legislature's choice in this regard is logical: it did not want TWIA denying claims for covered perils for reasons that TWIA knows or should know with proper investigation to be within the policy. Using the wind claim here as an example, TWIA should not deny coverage because the claimant said the damage occurred on May 24, 2015 and TWIA knows, or through reasonable investigation should know, the storm occurred on May 23, 2015.

Under that scenario, a claim of damage on May 24, 2015 would be properly denied if the storm occurred on May 23, 2015, a day earlier. But the Legislature knew that TWIA was much more sophisticated than the insured and would have a much greater understanding of when and how covered perils occurred—after all that is the entire mission of TWIA. The Legislature protected claimants from such errors by making the cause of action about whether TWIA's "denial of coverage was proper" and not whether the insured's choice of date in a claim was proper. TEX. INS. CODE ANN. § 2210.576(a).

Other parts of the statute confirm that the Legislature's use of "coverage" was intentional and expressed its desire to look beyond the "claim" submitted by the claimant. In the bad faith portion of the statute, the Legislature authorized bad faith damages in certain situations, including where TWIA "reject[s] a claim without conducting a reasonable investigation with respect to the claim." TEX. INS. CODE ANN. § 2210.576(d)(5). If the Legislature wanted this statutory claim triggered by propriety of denying the "claim" instead of "coverage," it would not have burdened TWIA with an obligation to conduct a reasonable investigation. Similarly, courts have concluded that coverage and claims are different issues. *Texas Windstorm Ins. Ass'n v. Jones*, 512 S.W.3d 545, 550

(Tex.App.—Houston [1st Dist.] 2016, no pet.); *Texas Windstorm Ins. Ass'n v. Park*, No. 13-18-00634-CV, 2019 WL 1831771 *6 (Tex.App.—Corpus Christi 2019, no pet.).

In fact, the statute gives the insured one year to file a claim with TWIA, "an insured must file a claim under an association policy not later than the first anniversary of the date on which the damage to the property...occurs." TEX. INS. CODE ANN. § 2210.573(a). In light of the one-year reporting requirement, Valstay premised its lawsuit on the hotel being damaged during the period from July 8, 2014 to July 8, 2015. CR8-9,82-83.

In opening and the presentation of evidence, Valstay pointed to the window of time even as it presented evidence of that the damage occurred on two specific dates. 2RR18, 22-23, 26-27; 2RR64-66. By pointing to this window, Valstay recognized that the jury may disagree with those two specific dates. 2RR18, 22-23, 26-27. Regardless, the evidence proved that, at least wind damage, occurred during one of TWIA's policy periods. 1SRR65-67; 2RR53-56; 2RR61-64, 2RR78, 2RR83; 2RR127 2RR207; 3RR70, 3RR72073; 4RR84, 4RR125-126; 4RR144.

The jury charge should have asked the statutory language of whether TWIA's denial of coverage was proper, not whether TWIA complied with the agreement. The proper question would not need specific dates because

it tracks the exact language of the cause of action. But even if dates are necessary, those dates should have reflected Valstay's pleading and proof—that the damage occurred within a period covered by the TWIA policies. These mistakes with Question 1 were harmful error because the jury did not answer the proper questions about the cause of action and did not answer the relevant inquiry of whether the hotel sustained damage from a covered period during the relevant period of time.

b) The statutory claim has no knowledge requirement.

The court's charge misstated the law for a second reason—the statute imposes no knowledge requirement in determining the propriety of TWIA's denial of coverage. TEX. INS. CODE ANN. § 2210.576. In addition to limiting the jury's consideration to just two specific dates, the charge also limited TWIA's responsibility to damage "it either (1) knew about, or (2) should have known about after a reasonable investigation." CR734. The statutory cause of action does not have a knew or should have known standard and only asks whether the denial of coverage was "proper." TEX. INS. CODE ANN. § 2210.576(a).

Proper asks whether the coverage denial was "...strictly accurate: correct; [or] marked by suitability, rightness, or appropriateness: fit...." Merriam-Webster's Collegiate Dictionary 996 (11th ed. 2020)(numbering

omitted).[5] *See also* Black's Law Dictionary 1410 (10th ed. 2009)(defining proper to mean, among other definitions that do not fit this context, "appropriate, suitable, right, fit, or correct"). Whether the coverage denial was correct does not necessarily turn on what knowledge TWIA had and instead turns on whether it made the right decision. Thus, the knew-or-should-have-known standard placed a greater burden on Valstay than required by the statute. TEX. INS. CODE ANN. § 2210.576(a).

Indeed, such a knowledge requirement mixes the burdens required for a bad faith claim into the decision about whether TWIA made the right coverage decision. If TWIA rejected a claim without a reasonable investigation, that is bad faith under the statute. TEX. INS. CODE ANN. § 2210.576(d)(4). Similarly, if TWIA knew that its liability was "reasonably clear" but still denied a claim, that too is bad faith. TEX. INS. CODE ANN. § 2210.576(d)(5). Thus, what TWIA knew or should have known are components of the statutory bad faith claim. Instead of leaving knew or should have known to the bad faith claim, the trial court inserted those standards into Question 1. CR734. That standard elevated the general liability question to one that incorporated elements of a bad faith claim.

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[5] *See also* Meriam-Webster's Collegiate Dictionary 20a-21a (discussing the order of senses and omission of senses for a defined term, which provides additional guidance for how this dictionary ordered the definitions, i.e., in historically used senses listed first).

The knew-or-should-have-known standard improperly and harmfully increased the burden of proof on Valstay from just proving that TWIA's coverage denial was incorrect to proving that TWIA's coverage denial was not only incorrect but also that TWIA knew or should have known that it was incorrect. If the Legislature had intended such a requirement of proof, it would not have tacked liability to whether the decision was proper and explicitly listed the knew-or-should-have-known standard. And if it is part of the general TWIA liability question, then the Legislature would not have separately enacted bad faith standards based on what TWIA knew or should have known. By use of the term "proper," the Legislature enacted a liability standard solely based on whether TWIA's decision was correct and not based on what TWIA knew or should have known. The trial court's instruction erroneously elevated Valstay's burden of proof beyond the statutory cause of action.

c) Question 1 ignored the evidence on other storm dates.

The evidence also proves the trial court should not have asked Question 1 in this fashion. First, TWIA did not deny coverage because the alleged perils were outside of its policy periods or outside of the reporting requirement—the defense at trial. TWIA, instead, denied coverage because the damage was due to maintenance problems. TWIA said that the damage

to the flat and pent portions of the roof "[was] long-term due to the lack of, or improper, maintenance of the roofing systems." 2SRR392. TWIA also said the tiled pent roof had damage, "like the flat roofs,...due to deferred maintenance." 2SRR393. TWIA denied coverage due to maintenance issues. But TWIA admitted that wind damaged the roof. 2RR61-64. With the correct question about a "proper" denial of coverage, a jury could have concluded that TWIA did not properly deny coverage because a covered peril did, indeed, occur during one of TWIA's policies.

Second, Question 1 ignored the evidence presented at trial by limiting damage to two specific dates when the evidence included information about other storms. To be sure, Valstay attempted to prove that the damage occurred on those two dates. 2RR 127-129; 2RR120-123. And TWIA attempted to prove that it did not occur then. 3RR175; 3RR193-194. The jury also had evidence of other potential storms that may have damaged the roof. 1SRR68-127; 2SRR416-430. The limitation to two specific dates did not account for a world where the jury did not fully believe each side's explanation of the evidence. That limitation also did not guide the jury on what to do if it concluded that a covered peril damaged the hotel during the one-year-reporting period on dates different than what Valstay theorized.

A court should instruct the jury on all the evidence heard, not what one side or the other claims to be correct. *Wakefield v. Bevly*, 704 S.W.2d 339, 350 (Tex.App.—Corpus Christi 1985, no writ). ("It is the duty of the trial court to submit such explanatory instructions as are proper so as to enable the jury to render a verdict and to issue such instructions that apply the law to the facts, as shown by the evidence in that trial.")(cleaned up).

The jury's question about whether it must consider only the dates in the jury charge proves that it believed Valstay sustained damage from a covered peril at some point in time. CR817; 5RR82. Indeed, the jury wanted to know what to do with the evidence that the trial court admitted about "all other prior dates." *Id*. While this jury question may not prove that the jury would have found an improper denial of coverage, it illustrated that the jury believed that the other dates were germane to their deliberations. Instead, the trial court limited the evidence to the two specific dates, and no one will ever know how the jury would have answered a broader question about other potential storm dates. CR734; 5RR82.

Question 1 was defective because it improperly asked a question on a recognized cause of action. *Se. Pipe Line Co.*, 997 S.W.2d at 172. The defective question did not track the statutory language. And it compounded that problem by overly restricting the potential date that the peril occurred

to just two days out of the policy period despite the jury hearing evidence of other potential dates when the damage could have occurred. The question then elevated the burden of proof beyond what the statute required by insisting that Valstay make out a bad faith claim in order to prove liability for improper denial of a claim. This is harmful error.

d) Question 1 misstated the terms of the TWIA policies.

While the ultimate issue in the case was whether TWIA's denial of coverage was proper, terms of the insurance policy should have supplemented that question to help the jury determine the propriety of the denial of coverage. Given the competing evidence about when the hotel's damage occurred, the trial court should have instructed the jury on the policies' reporting obligations. That omission, combined with the limitation of the jury's analysis to two specific dates, left Valstay with less insurance than it purchased. *Compare* CR734 *with* 1SRR39. More importantly, the reporting obligation is an affirmative defense (which is discussed in detail below), and so the charge should have instructed the jury that TWIA bore the burden of proof on that issue.

To understand the reporting obligation, a little background on the policies is helpful. First, each policy provides insurance coverage for direct physical loss that occurs during the policy period from hail and windstorm.

1SRR154. The insuring clause provides, "[w]e insure for direct physical loss to the covered property caused by windstorm or hail unless the loss is excluded in the Exclusions....This policy applies only to loss which occurs during the policy period shown in the Declarations." 1SRR 154; 1SRR156.

Unlike most insurance policies, this language is not an "occurrence" policy. In an occurrence policy, the insuring clause covers "physical loss" or "damage" from an "occurrence." The policy will then define occurrence, which the insured would have to prove at trial. *See generally, Grimes Const., Inc. v. Great Am. Lloyds Ins. Co.*, 248 S.W.3d 171, 171 (Tex. 2008)("The CGL's insuring agreement provides coverage for property damage caused by an occurrence..."); *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 119–20 (Tex. 2015) (discussing the definition of the term "occurrence" in a first party property insurance policy and the effect of the definition on coverage).

TWIA's policy, however, has no requirement of "an occurrence." It covers "direct physical loss" from "windstorm or hail." 1SRR 154. The policy does not limit coverage to an occurrence, and it broadly provides coverage for losses that "occur[] during the policy period." 1SRR 156. Instead of limiting coverage to a specific event, the policies cover all windstorm or hail

events occurring during the policy period. The policies further require that a claimant report damage within a year of the precipitating event. 1SRR156.

The trial court's instructions failed to incorporate these policy terms to guide the jury in evaluating the evidence in this case. The evidence revealed that the hotel's roof was in good working condition, i.e., had no wind or hail damage, as of the engineer's certification on March 21, 2013. 1SRR65-67. The evidence further proved that everyone agreed that the roof sustained at least wind damage after that certification and before Valstay's report of claim. 2RR61-64; 2RR78; 2RR83; 2RR127; 3RR70; 3RR72-73; 4RR84; 4RR125-126; 4RR144. Finally, the evidence established that TWIA insured the hotel against wind and hail damage for the entire period between the engineer's certification and the report of claim. 2RR49; 4RR153; CR127-128. Whether it was TWIA's 2014-2015 policy or TWIA's 2013-2014 policy, the evidence confirmed that a covered peril—at a minimum wind, which was agreed by the parties—damaged the hotel. That met Valstay's burden of proof to show that a covered peril occurred during one of TWIA's policy periods.

The Court's instructions, however, allowed the jury to find TWIA's failure to comply with the agreement only if the damage occurred on the two specific dates. CR734. But that is not something the policies require.

1SRR154; 1SRR156. The evidence established coverage. The instruction that limited the policy period to two specific dates misstated the coverage afforded by the policies and misinformed the jury about the available insurance, limiting multiple year-long policy periods to two specific dates. 1SRR154; 1SRR156; CR734.

TWIA's affirmative defense was the policy required that claims be reported within one year. 2RR34, 41-42; CR16-17. Even aside from the issue being an affirmative defense, Question 1 failed to guide the jury to analyze the policy's one-year reporting requirement in any fashion. CR734. The one-year reporting requirement meant that Valstay's July 8, 2015 claim report carried with it all wind and hail damage that occurred back to July 8, 2014. 1SRR156; 2RR36-37, 2RR208-209, SRR 165. Instead of instructing the jury to consider potential wind and hail events dating back to July 8, 2014, the jury charge limited their consideration of the evidence to two specific dates. CR734 Those dates misstated the terms of the reporting requirement.

2. Question 1 misplaced the burden of proof for TWIA's affirmative defenses on Valstay.

Aside from misstating the law and the insurance policy as well as limiting the evidence that the jury could consider, Question 1 also misplaced the burden of proof. Under Texas law, the insured only must

prove that it sustained a loss that the insurance policy covers. *See Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010) ("Initially, the insured has the burden of establishing coverage under the terms of the policy."); *Texas Windstorm Ins. Ass'n v. Dickinson Independent Sch. Dist.*, 561 S.W.3d 263, 273–74 (Tex.App.-Houston [14th Dist.] 2018, pet. denied Mar. 13, 2020)("Thus, to obtain judgment against TWIA for breach of the policy, DISD first had to establish that the direct physical losses to its covered property were caused by windstorm or hail—in this instance windstorm or hail during Hurricane Ike.").

As a result, Valstay only had to establish it suffered a loss to the property that was caused by wind or hail during a TWIA policy period. 1SRR154; 1SRR156. As discussed herein, Valstay—and the evidence—established exactly that, which met Valstay's burden of proof. *See Dickinson Indep. Sch. Dist.*, 561 S.W.3d at 273-274.

TWIA then had the burden to plead and prove any exclusions, limitations on liability, or other matters to avoid liability under its policies. TEX. INS. CODE ANN. § 554.002; TEX. R. CIV. P. 94. Two affirmative defenses arose in the case, and the trial court incorrectly placed the burden of proof for both of them on Valstay instead of TWIA. First, TWIA asserted the one year limitations period for reporting claims. 2RR34, 41-42; CR16-17. While

TWIA pleaded that defense, it did not satisfy the burden of proof of that affirmative defense. CR16-17; 2RR65-66. And worse still, the jury charge put that burden on Valstay. CR734.

Second, TWIA submitted a jury question including the knew-or-should-have-known standard to support its claim that the denial of coverage was proper. But that affirmative defense was neither pleaded nor proven. CR13-20. And like limitations, the jury charge incorrectly put that burden on Valstay. CR734. Those charge errors are reversible error.

a) The reporting requirement is an affirmative defense, and the charge improperly burdened Valstay with the burden of proof on that affirmative defense.

The statutes governing TWIA create a one-year limitations period[6] for claims against TWIA, requiring the insured to "file a claim...not later than the first anniversary of the date on which the damage to the property that is the basis of the claim occurs." TEX. INS. CODE ANN. § 2210.573(a). That statute is a limitations period,

> Section 2210.573(a) sets forth a clear and unambiguous one-year limitations period for when a claimant may file a claim

[6] To the extent that TWIA's claim-limitations statute could be considered a statute of repose, it would still be an affirmative defense. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex.1996)(holding that defendant bore burden of establishing right to summary judgment on basis of statute of repose defense); *Nexen Inc. v. Gulf Interstate Engineering Co.*, 224 S.W.3d 412, 416 (Tex.App.-Houston [1st Dist.] 2006, no pet.)(observing that statute of repose operates as affirmative defense on which defendant bears burden of proof).

> with TWIA, subject to a 180–day discretionary extension from the commissioner of insurance.

Housing & Community Servs., Inc. v. Texas Windstorm Ins. Ass'n, 515 S.W.3d 906, 910 (Tex. App.—Corpus Christi 2017, no pet.).

Limitations periods are affirmative defenses upon which the party claiming the defense has the burden of proof at trial. *In re United Services Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010)("Our procedural rules, which have the force and effect of statutes, and our cases classify limitations as an affirmative defense."); TEX. R. CIV. P. 94. An affirmative defense "acknowledges the existence of prima facie liability but asserts a proposition which, if established, avoids such liability." *Zorrilla v. Aypco Constr. II, LLC,* 469 S.W.3d 143, 156 (Tex. 2015)(cleaned up). All agreed wind damaged the hotel during a TWIA policy, establishing a prima facie case for coverage. TWIA's defense based on the claim-limitations period, on the other hand, asserted a proposition separate from that issue that sought to avoid liability. That is an affirmative defense, and the hallmark characteristic of that was "the burden of proof is on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings." *Id*.

TWIA agreed that the claim-reporting limitation was an affirmative defense because it affirmatively pleaded that the damage to the hotel did

not occur within one year of when Valstay reported the loss on July 8, 2015. CR16-17. But TWIA did not satisfy its burden of proof because all it could prove was that the damage occurred before December 2014 but not when it occurred before that date. 2RR65-66; 4RR45-47. Valstay's July 8, 2015 claim made all damage occurring within one year of that date timely, which made claims back to July 8, 2014 timely. By proving the damage occurred before December 2014, TWIA did not prove that the damage occurred outside of the one-year-reporting period.

The closest that TWIA came to "proving" its defense was its evidence that the wind damage occurred before December 2014. 2RR65-66; 4RR45-47. But TWIA's current and prior policies insured the hotel against wind and hail that occurred before December 2014. CR127; 1SRR130. Thus, without evidence of when the wind damage occurred or that the wind damage occurred before July 2014, TWIA did not prove its limitations defense and waived it by not requesting a limitations issue for the jury to decide.

Typically, the failure timely report a claim is not a defense if the insurer has not been prejudiced. *See PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 636–37 (Tex. 2008) ("We hold that an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the

insurer was not prejudiced by the delay."). But this Court has determined that the TWIA statute does not require prejudice to TWIA before it can deny untimely claims. *Hous. & Cmty. Servs., Inc. v. Texas Windstorm Ins. Ass'n*, 515 S.W.3d 906, 910 (Tex. App.—Corpus Christi 2017, no pet.). The statute, however, allows a claimant to seek a 180-day discretionary extension from the commissioner of insurance. TEX. INS. CODE ANN. § 2210.573(a). TWIA did not deny coverage of Valstay's claim because "wind damage occurred outside the reporting period" but denied it because of a lack of proper maintenance. 2SRR392-393.

That denial deprived Valstay of seeking the 180-day discretionary extension. Allowing a defense based on the one-year-reporting period prejudiced Valstay because it could not retroactively seek the extension. If the jury had been charged with the denial of the claim being proper, a jury may have concluded the denial, in this context, was improper, especially where TWIA saw wind damage before December 2014 and never investigated to determine if it was within the one-year period or even within the 180-day discretionary extension period.

Despite this lack of proof, the jury charge went further and placed the only burden of proof regarding the timing of the damage on Valstay, requiring a preponderance of the evidence to show that damage occurred

on May 24, 2015 for wind and April 13, 2015 for hail. CR732, 734. If TWIA wanted to rely on its report-of-claim limitations defense, then TWIA bore the burden to show that the damage occurred outside the reporting period. TEX. INS. CODE ANN. §554.002; TEX. R. CIV. P. 94. The jury needed guidance that TWIA bore that burden. Question 1 failed to provide that guidance, and no other question did.

"To properly place the burden of proof, the court's jury charge must be worded so that the jury's answer indicates that the party with the burden of proof on that fact established the fact by a preponderance of the evidence." *Maxus Energy Corp. v. Occidental Chem. Corp.*, 244 S.W.3d 875, 884 (Tex. App.–Dallas 2008, pet. denied). Applying this standard to TWIA's affirmative defense, the charge needed to instruct the jury that TWIA had the burden to prove that any wind or hail damage to the hotel occurred outside of the one-year reporting period, i.e., before July 8, 2014-July 8, 2015.

TWIA submitted no question on its limitations defense. CR102-124; CR706-712. The party with the burden of proof must submit a request when omitted by the court. *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex. 1988); *See also United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 481 (Tex. 2017)(holding that a defendant has no obligation to

complain about the omission of a plaintiff's theory of recovery); TEX. R. CIV. P. 279 ("Upon appeal all independent grounds of recovery *or defense* not conclusively established under the evidence and no element of which is submitted or requested are waived."). Despite this issue being TWIA's burden, Valstay submitted a substantially correct version of this issue by asking whether "the damage to the property that is the basis of Valstay, LLC's claim occur[red] prior to July 8, 2014?" CR710. The trial court refused that question. CR710.

Instead of charging the jury with TWIA's affirmative defense, the Court forced the issue into Question 1. CR734. The Court instructed the jury that TWIA only failed to comply if it failed to pay for damage that occurred on two specific dates. CR734. But that limited view of the evidence pigeonholed Valstay to its initial theory of when the damage occurred and did not account for all the evidence, which included that the damage occurred before December 2014. 2RR65-66; 4RR45-47. If TWIA wanted to argue that the Valstay did not report the claim timely, then it had to prove that the damage occurred outside the reporting period, have the trial court instruct the jury on that issue, and obtain jury findings on that issue.

TWIA argued that the limitations issue was subsumed in the issue of whether the claim denial was proper and the insured bore the burden on

this issue. *See, e.g.*, 4RR175 (arguing "proper" answered limitations). But proper cannot subsume the limitations issue in one question, especially without any other instruction on that point. Nothing in the charge guided the jury on the reporting period or what to do if they disagreed with Valstay's theories about the two storms but also believed that the damage occurred within the one-year reporting period. Indeed, the trial court's instruction limited the jury to just two dates—something the jury almost immediately questioned by asking about the other evidence. CR734; CR817, 5RR82.

Moreover, TWIA's position cannot be correct because it imbues *Casteel* problems into every TWIA jury trial and mixes the burdens of proof for claims for recovery and affirmative defenses. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). Imagine the scenario where the property owner reported a perfectly covered claim but missed the one-year-reporting period by one day. True, the concept of a "proper" denial of coverage may account for all the questions presented in that scenario. Yet "proper" does not account for the shifting burdens of proof.

The plaintiff would initially have to prove a covered claim, i.e., a covered peril damaged the property within a policy period. *Dickinson*, 561 S.W.3d at 273–74. The burden would then shift to TWIA to show that the

plaintiff reported the claim one day too late. TEX. INS. CODE ANN. §554.002; TEX. R. CIV. P. 94. And then, if a lack of prejudice is a defense, the burden could shift back the plaintiff to show no prejudice to TWIA by reporting the claim one day late. *See PAJ*, 243 S.W.3d at 636–37. An instruction on "proper" would, in theory, include all those concepts, but it would fail to guide the jury on which party has to prove which part of the varying issues of "proper." A reviewing court could never tell what the jury intended with a "yes" or "no" answer to that question.

Another problem with TWIA's "proper" analysis is that the question did not seek an answer to whether the coverage denial was proper. It asked whether TWIA complied with the agreement, not whether TWIA properly denied coverage. CR734. Thus, the jury's "no" answers to Question 1 do not say whether TWIA properly denied coverage. Here, the instruction on the specific dates left unanswered whether the damage occurred during the policy period and was timely reported. Even ignoring the burden of proof, Valstay presented a claim for damage during a window of time covered by a TWIA policy and timely reported. Question 1 focuses on just two dates instead of the relevant period for the timely reported claim. Question 1 was harmful because it did not answer whether the claim was timely reported. Question 1 was also harmful because it put TWIA's burden of proof on

Valstay. And Question 1 created *Casteel* error by mixing valid and invalid theories in one unified question.

b) The knowledge requirement was also an affirmative defense, and Question 1 improperly placed the burden of proof on Valstay.

Questions, instructions, and definitions that are submitted to the jury must be raised by the pleadings and the evidence. TEX. R. CIV. P. 278. Question 1 included an unpleaded affirmative defense about what TWIA knew or should have known. CR13-20;CR734. But, as discussed, "knew or should have known" is not a part of the statute. TEX. INS. CODE ANN. § 2210.575-.576.

If such a knowledge requirement exists, it can only exist as an affirmative defense. A lack of knowledge only matters to the extent that TWIA could contend that, if the damages were covered, TWIA did not know about the damage, which would make the denial of coverage proper. Like limitations, that sounds like an affirmative defense—a claim "that, if true, will defeat the plaintiff's...claim even if all the allegations in the complaint are true." *Zorrilla*, 469 S.W.3d at 155-156 (cleaned up).

TWIA never alleged this affirmative defense, which should bar it from being in the jury charge. CR 13-20. And the issue was not tried by consent. Trial by consent only occurs "under circumstances indicating both parties understood the issue was in the case, and the other party failed to make the

appropriate objection." *Maswoswe v. Nelson*, 327 S.W.3d 889, 895 (Tex.App.—Beaumont 2010, no pet.). Trial by consent should only cover "the exceptional case in which it clearly appears from the record...that the parties tried the unpleaded issue." *Greene v. Young*, 174 S.W.3d 291, 301 (Tex.App.—Houston [1st Dist.] 2005, pet. denied). In fact, an objection to the jury submission of an issue being tried by consent is sufficient to stop trial by consent. *Webb v. Glenbrook Owners Ass'n*, 298 S.W.3d 374, 380 (Tex.App.—Dallas 2009, no pet.). An objection to the submission "on some tenable ground" prevents trial by consent. *Harkey v. Tex. Employer's Ins. Ass'n*, 208 S.W.2d 919, 922 (Tex. 1948). Valstay objected to the submission of "knew or should have known" because TWIA did not properly plead that defense. 5RR11.

Moreover, the evidence presented at trial was completely devoid of any claimed damage that TWIA did not "know of" or should not have known of as a means to support its denial of coverage. In fact, the evidence at trial showed that representatives of TWIA repeatedly inspected the entire property. 2RR61-64; 2RR78; 2RR83; 4RR84; 4RR125-126; 4RR144. Indeed, TWIA admitted that Valstay cooperated in that endeavor. 2RR57-58.

The inclusion of the knowledge instruction in Question 1 created a *Casteel* problem by commingling an invalid theory that included this "knowledge" requirement with the purportedly valid theory of compliance with the contract. CR734. Because Question 1 incorporated this knowledge element into both aspects of the wind and hail issues as one question, neither the trial nor the appellate court can determine if the jury's "no" answers were due to the "knowledge issue," Valstay's failure to meet its burden of proof, or Valstay's allegedly untimely report of the claim. This improper inclusion of the instruction is reversible error and presumed harmful. *See Brannan Paving GP, LLC,* 446 S.W.3d at 24.

3. Question 1 improperly commented on the weight of the evidence

By specifying the specific dates of two storms—and no others—the jury charge improperly commented on the evidence. CR734. The charge effectively told the jurors that no other storm dates or damage mattered. And that meant Valstay could only prove its case by showing that the building was damaged on those two specific dates.

But Valstay's trial strategy was not that these two dates were the only dates on which the damage could occur. RR18, 22-23, 26-27; 2RR64-66. Instead, Valstay opened by arguing that one of the multiple TWIA policies covered the hotel's damage. 2RR11-23, 26-28. While it presented evidence

of those two storms, the evidence included other storms. 1SRR68-127; 2RR416-430. More importantly, when TWIA said the damage occurred before December 2014, Valstay argued that a TWIA policy still covered the claim. 2RR11-23, 26-28; 2RR64-66; CR81-83.

In other words, Valstay did not wed itself to those two storm dates and contemplated that the jury might believe part of TWIA's case that the damage occurred before those storms. To that end, Valstay argued that TWIA provided the hotel with coverage for a range of time, not just two dates. RR11-23, 26-28; 2RR64-66; CR81-83.

A trial court should not comment on the evidence, and courts "specifically prohibit judicial comments that indicate the opinion of the trial judge as to the verity or accuracy of the facts in inquiry." *Schack v. Prop. Owners Ass'n of Sunset Bay*, 555 S.W.3d 339, 355 (Tex.App.—Corpus Christi 2018, pet. denied). The entire dispute was when did the hotel sustain wind or hail damage, and the evidence and arguments of the parties did not just discuss whether it occurred on those two specific dates.

While Valstay theorized that the damage occurred on those dates, the entirety of the evidence included different potential storm dates. 1SRR68-127; 2SRR416-430. The trial court should have tasked the jury with deciding when the damage occurred, whether that damage occurred in a

TWIA policy period, and then whether Valstay timely reported the claim. *See* CR710. But instead of instructing the jury to decide those issues with a range of dates for covered claims that were timely reported, the trial court assumed the disputed fact in the charge by asking if the damage occurred on those two—and only those two—dates. CR734. That assumption of the disputed fact is erroneous and a prohibited judicial comment. *Id*.

Moreover, if no other dates mattered, then why did the trial consist of discussion of other dates? The trial at that point was not binary about damage occurring on those dates or not. Question 1's inclusion of specific dates validated the defense theory that the claim was properly denied because the damage did not occur on those two dates. 2RR42. But TWIA's policies provide more coverage than just on those two dates, and other storms affected the hotel. 1SRR154; 1SRR156; 1 SRR68-127; 2SRR416-430.

The harm from this instruction was evident when the jury asked about its consideration of other evidence beyond those two dates. CR817. The jury wondered what to do about the evidence of storms on other dates that potentially damaged the hotel. CR817. The jury's question back to the court shows that jury charge improperly narrowed the potential storm dates too far. CR817.

C. The trial court reversibly erred by conditioning the bad faith questions on the answer to Question 1 (Issue 2).

Section 2210.576 of the Texas Insurance Code contains specialized bad faith law applicable to TWIA. It says:

> (d) A claimant *that brings* an action against the association under Section 2210.575 *may, in addition to the covered loss*...recover damages...if the claimant proves by clear and convincing evidence that the association mishandled the claimant's claim to the claimant's detriment by intentionally:
>
> (1) failing to meet the deadlines or timelines established under this subchapter without good cause, including the applicable deadline established under Section 2210.5731 for payment of an accepted claim or the accepted portion of a claim;
>
> (2) disregarding applicable guidelines published by the commissioner under Section 2210.578(f);
>
> (3) failing to provide the notice required under Section 2210.573(d);
>
> (4) rejecting a claim without conducting a reasonable investigation with respect to the claim; or
>
> (5) denying coverage for a claim in part or in full if the association's liability has become reasonably clear as a result of the association's investigation with respect to the portion of the claim that was denied.

TEX. INS. CODE ANN. § 2210.576 (emphasis added). The bad faith claim is a separate claim from improper denial of a claim. *Id*. The statute does not, however, condition recovery on a finding of an improper denial of the claim. *Id*. It allows "a claimant *who brings an action*" to recover for bad

faith if the claimant proves certain facts. The statute does not limit recovery of bad faith claims to those *who prevail* on the underlying claim. One clear example from the statute is that TWIA could intentionally fail to make a claim decision in a timely manner without improperly denying the claim. TEX. INS. CODE ANN. § 2210.576(d)(1).

Indeed, the Supreme Court has instructed insurers and insureds that bad faith claims do not depend on the existence of coverage. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 490-501 (Tex. 2018)(discussing various ways in which an insured can recover statutory bad faith damages even when coverage did not exist such as where the statutory violation causes the loss of policy benefits, where the insurer's conduct causes the insured to lose contractual benefits, and where the insured's damages are from an independent injury for the statutory violation). The trial court denied TWIA's directed verdict motion related to the bad faith questions, thus sufficient evidence supported those questions. 3RR132-133. Those questions should not have been conditioned.

While Questions 3 and 4 generally presented Valstay's statutory bad faith claims, the trial court conditioned those questions on finding improper denial of coverage under Question 1. CR736-738. That conditioning instruction did not track the language of the statute, which

places no condition of bad faith claims on a finding of improper claim denial. TEX. INS. CODE ANN. § 2210.576(d); *Borneman*, 22 S.W.3d at 413; *R.R. Comm'n of Tex.*, 482 S.W.3d at 571. In fact, the evidence conclusively proved TWIA failed to meet the deadlines or timelines under the statute. It received the claim on July 8, 2015, and, by statute, had 60 days to accept or deny coverage. 2RR36-37, 2RR208-209, SRR 165; TEX. INS. CODE. ANN. § 2210.573(d). TWIA did not deny coverage until September 15, 2015, which is more than 60 days after Valstay reported the claim. 2RR209; 2SR392-398. Regardless of whether TWIA's denial of coverage was proper, it did not "meet the deadlines and timelines established" under the Texas Insurance Code. TEX. INS. CODE ANN. § 2210.576(d)(1).

Of course, liability for that type of a bad faith claim is not strict liability for a late acceptance or denial of a claim, and Valstay had to prove that TWIA failed to do so "without good cause." TEX. INS. CODE ANN. 2210.576(d)(1). Like the deadlines themselves, good cause does not depend on the propriety of the claim denial.

Similarly, the Legislature permitted damages for "rejecting a claim without conducting a reasonable investigation with respect to the claim." TEX. INS. CODE ANN. § 2210.576(d)(4). That bad faith claim does not require that the denial of the claim be proper or improper. Liability hinges on

whether TWIA conducted a reasonable investigation before denying the claim. *Id.* Here, the evidence proved that a TWIA policy covered wind and hail damage from the time of the engineer's certification through Valstay's report of claim. 2RR49; 4RR153; CR127-128. TWIA only determined that the current policy did not cover the claim and that the damage occurred before December 2014. 2RR209, 2SRR 392-398. But TWIA ignored that its prior policy may have covered the claim and been timely reported. CR127.

Even with the one-year reporting requirement, Valstay reported the claim on July 8, 2015, making its claim timely for damage from July 8, 2014 through July 8, 2015. Instead of investigating whether wind and hail damaged the hotel during that period, TWIA denied the claim without any investigation into coverage under the prior policy. 2RR209, 2SRR 392-398. A jury could conclude that the investigation was unreasonable because TWIA ignored its own coverage during the time before December 2014. And a jury could conclude that doing nothing further to investigate was not reasonable under those circumstances.

One last point on this issue—the evidence proved that TWIA never told Valstay that it "found wind damage on [Valstay's] property[] and [that] it may have occurred during [TWIA's] policy period or periods. It just didn't happen on May 24, 2015." 2RR68. Indeed, TWIA's documentation of the

investigation reported the roof suffered wind damage that "may have occurred during a prior TWIA policy period." 2RR68. But that document never went to Valstay. 2RR68.

By not looking for damage within the prior policy and within the reporting period and by not telling Valstay to look for damage during that window, TWIA left Valstay in the dark about the now-contested issue of when the damage occurred. And the denial of coverage letter only compounded this problem. TWIA did not deny coverage because the claim was untimely but because of maintenance issues. 2SR392-393.

Valstay never learned—until too late—that it needed to look for evidence to prove that the damage occurred during this earlier window in case it did not occur in May 2015. TWIA's unreasonable and incomplete investigation hampered Valstay's ability to prove that the roof's damage was covered under a TWIA policy and within the reporting period. In other words, a jury could conclude that TWIA rejected Valstay's claim without conducting a reasonable investigation even if it concluded that the denial was proper based on the evidence presented.

The Legislature did not require that a claimant prevail on the issue of the improper denial of the claim before allowing bad faith damages. Had the Legislature intended that, it would condition that in the statute by

requiring the claimant "prevail" against the TWIA on proper claim denial. That is not the statutory language. A jury charge that improperly charges the jury on a recognized cause of action is error. *Se. Pipe Line Co.*, 997 S.W.2d at 172. An improper conditioning instruction is reversible error,

> a party is entitled to an affirmative submission of all of his theories of recovery that have support in the pleadings and evidence....If a conditional submission deprives a party of the affirmative submission of an issue raised by the pleadings and evidence, such conditional submission also constitutes reversible error.

Varme v. Gordon, 881 S.W.2d 877, 881 (Tex. App.—Houston [14th Dist.] 1994), writ denied (Feb. 2, 1995). *See also Washington v. Reliable Life Ins. Co.*, 581 S.W.2d 153, 160 (Tex.1979)(remanding for a new trial when issue raised by the evidence not reached because charge improperly conditioned); *Texas Indemnity Ins. Co. v. Thibodeaux*, 129 Tex. 655, 106 S.W.2d 268, 270 (1937)(finding error when affirmative defense raised by pleadings and evidence improperly conditioned on answer to question on main cause of action).

D. This case must be remanded for a new trial.

The proper remedy for an erroneous jury charge is remand for a new trial. *Glenn v. Leal*, No. 18-0344, 2020 WL 854922, at *3 (Tex. Feb. 21, 2020)("When a trial court gives an erroneous charge that instructs the jury on the incorrect law applicable in the case, we have held that a new trial is

the appropriate remedy."); *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 44 (Tex. 2007)("[W]here...the theory of recovery was defectively submitted, as opposed to a situation where the plaintiff 'refused to submit a theory of liability' after defendant's objection, the proper remedy is to remand for a new trial.")(cleaned up); *George Grubbs Enters., Inc. v. Bien*, 900 S.W.2d 337, 338 (Tex. 1995)(reversing the judgment of the court of appeals after finding jury charge error and remanding the case to the trial court for further proceedings); *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994)("But because the charge was defective, and Eagle Star properly objected, it is entitled to a new trial.")(cleaned up).

PRAYER

Wherefore, premises considered, Valstay respectfully requests that this case be reversed and remanded for a new trial, that Valstay be awarded its appellate costs, and that Valstay receive any other relief as may be proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Relying on the word count function in word processing software used to produce this document, I certify that the length of this document is 13,303 words excluding those portions of the document identified in Tex. R. App. P. 9.4(i).

/s/Robert W. Loree
Robert W. Loree

CERTIFICATE OF SERVICE

I certify that Appellant has served a true and correct copy of the foregoing document on July 22, 2020 by to all counsel of record:

/s/Robert W. Loree
Robert W. Loree

No. 13-19-00379-CV

Court of Appeals for the Thirteenth District of Texas

VALSTAY, LLC,

Plaintiff – Appellant,

v.

TEXAS WINDSTORM INSURANCE ASSOCIATION,

Defendant – Appellee.

On Appeal from the Nueces County 28th District Court
District of Texas, Hon. Nanette Hasette
Civil Action NO. 2017-DCV-4203-A

APPENDIX IN SUPPORT OF APPELLANT'S AMENDED BRIEF

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Attorneys for Appellant

Oral Argument Requested

TAB 1

Filed
5/9/2019 2:25 PM
Anne Lorentzen
District Clerk
Nueces County, Texas

CAUSE NO. 2017DCV-4203-A

VALSTAY, LLC Plaintiff	'	IN THE DISTRICT COURT
v.	'	
	'	28th JUDICIAL DISTRICT
TEXAS WINDSTORM INSURANCE ASSOCIATION, Defendant	'	NUECES COUNTY, TEXAS

FINAL JUDGMENT

On April 15, 2019, this case was called for trial. Plaintiff, Valstay, LLC, appeared through its representative and attorney and announced ready for trial. Defendant, Texas Windstorm Insurance Association ("TWIA"), appeared through its representative and attorney and announced ready for trial.

After a jury was impaneled and sworn, it heard the evidence and arguments of counsel. In response to the jury charge, the jury made findings that the Court received, filed, and entered of record. The jury made the following material findings:

QUESTION NO. 1

Did *Texas Windstorm Insurance Association* fail to comply with the agreement entitled T.W.I.A. Commercial Policy?

The Texas Windstorm Insurance Association Dwelling Windstorm and Hail Policy covers direct physical loss to the covered property caused by windstorm or hail during the policy period.

Texas Windstorm Insurance Association failed to comply with the agreement if it failed to pay for all windstorm damage, if any, that resulted from the alleged event occurring on May 24, 2015, that it either (1) knew about, or (2) should have known about after a reasonable investigation.

Texas Windstorm Insurance Association failed to comply with the agreement if it failed to pay for all hail damage, if any, that resulted from the alleged event occurring on April 13, 2015, that it either (1) knew about, or (2) should have known about after a reasonable investigation.

Answer "Yes" or "No" for each of the following:

A. Windstorm

Answer: **NO**

B. Hail:

Answer: **NO**

Other questions were submitted but were not answered as they were conditioned upon a "yes" answer to Question 1. The charge submitted to the jury and the jury's findings are incorporated herein by reference as if set out in full. The verdict and the jury's question is incorporated in *haec verba*.

It is therefore ORDERED, that Plaintiff take nothing by its lawsuit in this case against Defendant TWIA. All costs of Court are taxed against Plaintiff, Valstay, LLC.

This judgment is final, disposes of all claims and all parties, and is appealable.

SIGNED and ENTERED on this the 14 day of May, 2019.

JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

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TAB 2

CAUSE NO. 2017DCV-4203-A

VALSTAY, LLC Plaintiff	'	IN THE DISTRICT COURT
v.	'	28th JUDICIAL DISTRICT
TEXAS WINDSTORM INSURANCE ASSOCIATION, Defendant	'	NUECES COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.I will give you a number where others may contact you in case of an emergency.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

FILED
@ 9:45 am
APR 23 2019

Here are the instructions for answering the questions:

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence unless you are told otherwise. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence unless you are told otherwise.

7. The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

8. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

9. Do not answer questions by drawing straws or by any method of chance.

10. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

11. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

12. Unless otherwise instructed, the answers to the questions must be based on the decision of at least 10 of the 12 jurors. The same 10 jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

Additional Instructions

As to any question to which an objection has been sustained, you must not speculate as to what the answer might have been or as to the reason for the objection. You must not consider for any purpose any offer of evidence which was rejected or any evidence that was stricken out by the Court. Such matters are to be treated as though you had never known them.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

Deposition testimony is testimony which has been previously taken under oath. You are instructed that such testimony is entitled to be given the same weight you would give it if it were presented by a witness appearing in the courtroom during trial.

Texas Windstorm Insurance Association is responsible for the conduct of their agents, adjusters and representatives including, but not limited to, Gary Sims and Al Edwards.

The term "Property" shall refer to the property located at 6255 IH 37, Corpus Christi, Texas 78409.

QUESTION NO. 1

Did *Texas Windstorm Insurance Association* fail to comply with the agreement entitled T.W.I.A. Commercial Policy?

The Texas Windstorm Insurance Association Dwelling Windstorm and Hail Policy covers direct physical loss to the covered property caused by windstorm or hail during the policy period.

Texas Windstorm Insurance Association failed to comply with the agreement if it failed to pay for all windstorm damage, if any, that resulted from the alleged event occurring on May 24, 2015, that it either (1) knew about, or (2) should have known about after a reasonable investigation.

Texas Windstorm Insurance Association failed to comply with the agreement if it failed to pay for all hail damage, if any, that resulted from the alleged event occurring on April 13, 2015, that it either (1) knew about, or (2) should have known about after a reasonable investigation.

Answer "Yes" or "No" for each of the following:

A. Windstorm

Answer: No

B. Hail:

Answer: No

If you answered "Yes" to any part of Question No. 1, then answer the following question. Otherwise do not answer the following question.

QUESTION NO. 2

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate *Valstay, LLC,* for its damages, if any, that resulted from the failure to comply you found in response to Question No. 1?

Consider only the following element of damages, if any, and none other.

Do not add any amount for interest or penalties on damages, if any.

Answer separately in dollars and cents for damages, if any, for each of the following:

A. Windstorm

Answer: _____

B. Hail:

Answer: _____

If you answered "Yes" to any part of Question No. 1, then answer the following question. Otherwise do not answer the following question.

QUESTION NO. 3

Do you find by clear and convincing evidence that *Texas Windstorm Insurance Association* mishandled *Valstay, LLC's,* claim?

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "Yes" or "No" as to each subpart.

Mishandling *Valstay, LLC's,* claim means any one or more of the following:

A. Rejecting the claim without conducting a reasonable investigation with respect to the claim; or

Answer: _____

B. Denying coverage for the claim in full if *Texas Windstorm Insurance Association's* liability had become reasonably clear as a result of the association's investigation with respect to the portion of the claim that was denied; or,

Answer: _____

C. Failing to meet the applicable statutory deadlines or timeliness requirements without good cause;

Answer: _____

D. Disregarding applicable guidelines published by the Texas Insurance Commissioner; or,

Answer: _____

E. Failing to provide notice of acceptance or denial of the claim within 60 days after receiving the claim, or after receiving all the information requested from Plaintiff;

Answer: _____

If you answered "Yes" to any part of Question No. 3, then answer the following question. Otherwise do not answer the following question.

QUESTION NO. 4

Do you find by clear and convincing evidence that *Texas Windstorm Insurance Association* engaged in such conduct intentionally?

"Intentionally" means actual awareness of the facts surrounding the act or practice listed below, coupled with the specific intent that the *Valstay, LLC,* suffer harm or damages as a result of the act or practice.

Specific intent may be inferred from objective manifestations that *Texas Windstorm Insurance Association* acted intentionally or from facts that show that *Texas Windstorm Insurance Association* acted with flagrant disregard of *Texas Windstorm Insurance Association*'s duty to avoid the acts or practices listed below.

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

In answering this question, consider only the conduct that you have found in Question No. 3 was committed by *Texas Windstorm Insurance Association.*

Answer "Yes" or "No" as to each subpart.

A. Rejecting the claim without conducting a reasonable investigation with respect to the claim; or

Answer: _____

B. Denying coverage for the claim in full if *Texas Windstorm Insurance Association's* liability had become reasonably clear as a result of the association's investigation with respect to the portion of the claim that was denied; or,

Answer: _____

C. Failing to meet the applicable statutory deadlines or timeliness requirements without good cause; or,

Answer: _____

D. Disregarding applicable guidelines published by the Texas Insurance Commissioner; or,

Answer: _____

E. Failing to provide notice of acceptance or denial of the claim within 60 days after receiving the claim, or after receiving all the information requested from Plaintiff.

Answer: _____

If you answered "Yes" to any part of Question No. 4, then answer the following question. Otherwise do not answer the following question.

QUESTION NO. 5

What sum of money, if any, in addition to actual damages, should be awarded to *Valstay, LLC,* because *Texas Windstorm Insurance Association*'s conduct was committed intentionally?

INSTRUCTIONS

The factors to consider in awarding additional damages, if any, include:

(a) The nature of the wrong;

(b) The character of the conduct involved;

(c) The degree of culpability of TWIA;

(d) The situation and sensibilities of the parties; and

(e) The extent to which the conduct in question offends a public sense of justice and propriety.

Answer in dollars and cents for damages, if any.

Answer: _____

If you answered "Yes" to either part of Question No. 1, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 6

What is a reasonable fee for the necessary services of *Valstay, LLC's,* attorneys in this case?

Factors to consider in determining a reasonable fee include –

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;

2. The fee customarily charged in the locality for similar legal services;

3. The amount involved and the results obtained;

4. The nature and length of the professional relationship with the client;

5. The experience, reputation, and ability of the lawyer or lawyers performing the services; and,

6. Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Answer in dollars and cents for each of the following:

a. For representation in the trial court;

Answer: $ _____

b. For representation through appeal to the court of appeals:

Answer: $ _____

c. For representation at the petition for review stage in the Supreme Court;

Answer: $ _____

d. For representation at the merits briefing stage in the Supreme Court of Texas;

Answer: $ _____

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;

   c. give written questions or comments to the bailiff who will give them to the judge;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and

   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. You may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

2. If ten jurors agree on every answer, those ten jurors sign the verdict.

If eleven jurors agree on every answer, those eleven jurors sign the verdict.

If all twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten who agree on every answer will sign the verdict.

Do you understand these instructions? If you do not. please tell me now.

JUDGE PRESIDING

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

✓ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

_____ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

	SIGNATURE	NAME PRINTED
1.		Erin Houston
2.	Leah LeMaire	Leah LeMaire
3.	Gracie Casarez	Gracie Casarez
4.	Phyllis Tedford	PHYLLIS TEDFORD
5.		Mackenzie Mackey
6.		Teresa Trujillo
7.	Adriana S. Gonzales	ADRIANA S GONZALES
8.		COLIN P. OZAND
9.	Kay Piras	Kay Piras
10.		Leticia Ramirez
11.		JUAN HERRERA

TAB 3

Vernon's Texas Statutes and Codes Annotated
Insurance Code
Title 10. Property and Casualty Insurance (Refs & Annos)
Subtitle G. Pools, Groups, Plans, and Self-Insurance
Chapter 2210. Texas Windstorm Insurance Association
Subchapter L-1. Claims: Settlement and Dispute Resolution

V.T.C.A., Insurance Code § 2210.573

§ 2210.573. Filing of Claim; Claim Processing

Effective: September 1, 2019
Currentness

(a) Subject to Section 2210.205(b), an insured must file a claim under an association policy not later than the first anniversary of the date on which the damage to property that is the basis of the claim occurs.

(b) The claimant may submit written materials, comments, documents, records, and other information to the association relating to the claim. If the claimant fails to submit information in the claimant's possession that is necessary for the association to determine whether to accept or reject a claim, the association may, not later than the 30th day after the date the claim is filed, request in writing the necessary information from the claimant.

(c) The association shall, on request, provide a claimant reasonable access to all information relevant to the determination of the association concerning the claim. The claimant may copy the information at the claimant's own cost or may request the association to provide a copy of all or part of the information to the claimant. The association may charge a claimant the actual cost incurred by the association in providing a copy of information under this section, excluding any amount for labor involved in making any information or copy of information available to a claimant.

(d) Unless the applicable 60-day period described by this subsection is extended by the commissioner under Section 2210.581, not later than the later of the 60th day after the date the association receives a claim or the 60th day after the date the association receives information requested under Subsection (b), the association shall provide the claimant, in writing, notification that:

(1) the association has accepted coverage for the claim in full;

(2) the association has accepted coverage for the claim in part and has denied coverage for the claim in part; or

(3) the association has denied coverage for the claim in full.

(e) In a notice described by Subsection (d)(1), the association must inform the claimant of the amount of loss the association will pay and of the time limit to request appraisal under Section 2210.574.

(f) In a notice described by Subsection (d)(2) or (3), the association must inform the claimant of, as applicable:

(1) the portion of the loss for which the association accepts coverage and the amount of loss the association will pay;

(2) the portion of the loss for which the association denies coverage and a detailed summary of the manner in which the association determined not to accept coverage for that portion of the claim; and

(3) the time limit to:

(A) request appraisal under Section 2210.574 of the portion of the loss for which the association accepts coverage; and

(B) provide notice of intent to bring an action as required by Section 2210.575.

(f-1) In a notice described by Subsection (d)(1) or (2), the association must include additional information concerning the availability of supplemental payments under the policy, including:

(1) a description of the process for requesting a supplemental payment; and

(2) applicable deadlines related to supplemental payments.

(g) In addition to the notice required under Subsection (d)(2) or (3), the association shall provide a claimant with a form on which the claimant may provide the association notice of intent to bring an action as required by Section 2210.575.

Credits

Added by Acts 2011, 82nd Leg., 1st C.S., ch. 2 (H.B. 3), § 41, eff. Sept. 28, 2011. Amended by Acts 2019, 86th Leg., ch. 525 (S.B. 615), § 14, eff. Sept. 1, 2019.

V. T. C. A., Insurance Code § 2210.573, TX INS § 2210.573
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

TAB 4

Vernon's Texas Statutes and Codes Annotated
Insurance Code
Title 10. Property and Casualty Insurance (Refs & Annos)
Subtitle G. Pools, Groups, Plans, and Self-Insurance
Chapter 2210. Texas Windstorm Insurance Association
Subchapter L-1. Claims: Settlement and Dispute Resolution

V.T.C.A., Insurance Code § 2210.576

§ 2210.576. Issues Brought to Suit; Limitations on Recovery

Effective: September 28, 2011
Currentness

(a) The only issues a claimant may raise in an action brought against the association under Section 2210.575 are:

(1) whether the association's denial of coverage was proper; and

(2) the amount of the damages described by Subsection (b) to which the claimant is entitled, if any.

(b) Except as provided by Subsections (c) and (d), a claimant that brings an action against the association under Section 2210.575 may recover only:

(1) the covered loss payable under the terms of the association policy less, if applicable, the amount of loss already paid by the association for any portion of a covered loss for which the association accepted coverage;

(2) prejudgment interest from the first day after the date specified in Section 2210.5731 by which the association was or would have been required to pay an accepted claim or the accepted portion of a claim, at the prejudgment interest rate provided in Subchapter B, Chapter 304, Finance Code; and

(3) court costs and reasonable and necessary attorney's fees.

(c) Nothing in this chapter, including Subsection (b), may be construed to limit the consequential damages, or the amount of consequential damages, that a claimant may recover under common law in an action against the association.

(d) A claimant that brings an action against the association under Section 2210.575 may, in addition to the covered loss described by Subsection (b)(1) and any consequential damages recovered by the claimant under common law, recover damages in an amount not to exceed the aggregated amount of the covered loss described by Subsection (b)(1) and the consequential damages recovered under common law if the claimant proves by clear and convincing evidence that the association mishandled the claimant's claim to the claimant's detriment by intentionally:

(1) failing to meet the deadlines or timelines established under this subchapter without good cause, including the applicable deadline established under Section 2210.5731 for payment of an accepted claim or the accepted portion of a claim;

(2) disregarding applicable guidelines published by the commissioner under Section 2210.578(f);

(3) failing to provide the notice required under Section 2210.573(d);

(4) rejecting a claim without conducting a reasonable investigation with respect to the claim; or

(5) denying coverage for a claim in part or in full if the association's liability has become reasonably clear as a result of the association's investigation with respect to the portion of the claim that was denied.

(e) For purposes of Subsection (d), "intentionally" means actual awareness of the facts surrounding the act or practice listed in Subsection (d)(1), (2), (3), (4), or (5), coupled with the specific intent that the claimant suffer harm or damages as a result of the act or practice. Specific intent may be inferred from objective manifestations that the association acted intentionally or from facts that show that the association acted with flagrant disregard of the duty to avoid the acts or practices listed in Subsection (d)(1), (2), (3), (4), or (5).

Credits

Added by Acts 2011, 82nd Leg., 1st C.S., ch. 2 (H.B. 3), § 41, eff. Sept. 28, 2011.

V. T. C. A., Insurance Code § 2210.576, TX INS § 2210.576
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

TAB 5

Plaintiff's proposed Q

QUESTION NO. 1

Did *Texas Windstorm Insurance Association* fail to comply with its insurance policies?

Texas Windstorm Insurance Association failed to comply with the insurance policies if it failed to pay for any damage caused by windstorm or hail during the policy periods of ~~August 31, 2012 to October 1,~~ 2015. & May 24, 2015 and April 15, 2015

Answer "Yes" or "No" for each of the following:

A. Windstorm

Answer: _____

B. Hail

Answer: _____

ACCEPTED ✓ as modified

REJECTED ✓

TAB 6

Plaintiff Proposed Special 1 2 3

If you answered "Yes" to Question No. 1, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 7[8]

Did the damage to the property that is the basis of Valstay, LLC's claim occur prior to July 8, 2014?

Answer "Yes" or "No" for each of the following:

A. Windstorm

Answer: _____

B. Hail[9]

Answer: _____

ACCEPTED _____ REJECTED ✓ _____

9/22/2021

[8] Adapted from Section 2210.573 of the Texas Insurance Code
[9] PJC 101.58 (2018)

TAB 7

Plaintiff Proposed Q

If you have answered "Yes" to either part of Question No. 7, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 8

Was *Texas Windstorm Insurance Association* prejudiced by *Valstay, LLC's*, failure, if any, to file its claim before July 8, 2015?

An insurer is "prejudiced" if the failure to timely file the claim in this case prevents TWIA from investigating the circumstances of the loss and prepare adequately to adjust or defend the claim.

Answer "Yes" or "No."

Answer: _____

ACCEPTED _____ REJECTED ✓

4/22/2019

TAB 8

IN THE 28TH DISTRICT COURT
OF NUECES COUNTY, TEXAS

NO. 2017DCV-4203-A

Valstay, LLC
vs.
Texas Windstorm Insurance Association

JURY NOTE NO. 1 :

Are the following two dates the ONLY two dates we're aloud to consider:
(1) May 24, 2015 for wind
(2) April 13, 2015 for hail
If so, do we omit all other prior dates?

Erin Houston
Presiding Juror

ANSWER:

Nanette Hasette, Presiding Judge

EXHIBIT E
817

TAB 9

REPORTER'S RECORD
VOLUME 5 OF 6 VOLUMES
TRIAL COURT CAUSE NO. 2017-DCV-4203-A
APPELLATE COURT CAUSE NO 13-19-00379-CV

VALSTAY, LLC	*	IN THE DISTRICT COURT
PLAINTIFF,	*	
VS.	*	NUECES COUNTY, TEXAS
TEXAS WINDSTORM INSURANCE ASSOCIATION,	*	
DEFENDANT.	*	28TH JUDICIAL DISTRICT

* *

TRIAL ON THE MERITS

* *

On 23rd day of April, 2019 the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Nanette Hasette, Judge Presiding, held in Corpus Christi, Nueces County, Texas;

Proceedings reported by machine shorthand.

heard this for a long time. Thank you very much and we appreciate your attention.

THE COURT: All right. Now the jury may start your deliberations and you may go into the jury room. We will prepare all the documents you need and we will send them in with you in a few minutes. Thank you.

(11:14 a.m.)

(JURY RETIRES TO JURY ROOM TO BEGIN DELIBERATIONS)

THE COURT: Second note is they want to go to lunch. So they are asking me what time. I said, "Any time you wish to return, but may I suggest 1:15 or 1:30." Send that back. Send them to lunch.

So the answer to Question No 1, which reads, "Are the following two dates the only two dates were allowed -- she misspelled allowed.

MR. SALYER: I didn't catch that.

THE COURT: A loud, instead of a-l-l-o-w-e-d. To consider, one, May 24, 2015 for wind. Two, April 13, 2015 for hail. If so, do we admit all other prior dates.

MR. SALYER: Omit any other prior dates.

THE COURT: I said, "Please follow the Court's instructions and the evidence admitted." That is all we can do.

(LUNCH RECESS.)

THE STATE OF TEXAS)
COUNTY OF NUECES)

I, Rebecca Velasquez Rendon, Official Court Reporter in and for the 28th District Court of Nueces County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $_____ and was paid by _____.

WITNESS MY OFFICIAL HAND this the 13th day of December, 2020.

/S/Rebecca Velasquez Rendon
Texas CSR NO. 4023
Expiration Date: 12/31/2019
Official Court Reporter
28th Judicial District Court
Nueces County Courthouse
Corpus Christi, Texas 78401
Phone: (361) 888-0636
Fax: (361) 888-0634

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Envelope ID: 44760395
Status as of 07/23/2020 10:01:14 AM -05:00

Associated Case Party: Valstay, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Todd Lipscomb		todd@lhllawfirm.com	7/23/2020 9:53:32 AM	SENT
Daniel Dominguez		daniel@lhllawfirm.com	7/23/2020 9:53:32 AM	SENT

Associated Case Party: Texas Windstorm Insurance Association

Name	BarNumber	Email	TimestampSubmitted	Status
Jay Old		tmadden@hicks-thomas.com	7/23/2020 9:53:32 AM	SENT
Jay Old		jbaker@hicks-thomas.com	7/23/2020 9:53:32 AM	SENT
Jay Old		sdodson@hicks-thomas.com	7/23/2020 9:53:32 AM	SENT
Jay Old		gdenson@hicks-thomas.com	7/23/2020 9:53:32 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stephen Barrick		sbarrick@hicks-thomas.com	7/23/2020 9:53:32 AM	SENT
Jay Old		jold@hicks-thomas.com	7/23/2020 9:53:32 AM	SENT
Cassie Pruski		cassie@lhllawfirm.com	7/23/2020 9:53:32 AM	SENT
David Salyer		dpsalyer@mapalaw.com	7/23/2020 9:53:32 AM	SENT